Supreme Court, U.S.
FILED
SEP 6 1994
OFFICE OF THE CLERK

No. 94-223

In The

Supreme Court of the United States

October Term, 1994

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Petitioner,

vs.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

David P. Bruton
Alfred W. Putnam, Jr.
Drinker Biddle & Reath
Philadelphia National Bank Building
1345 Chestnut Street
Philadelphia, PA 19107-3496
(215) 988-2711

Attorneys for Respondent

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

BEST AVAILABLE COPY

24 pp

RESTATEMENT OF THE QUESTION PRESENTED

Did the Court of Appeals err in affirming the District Court's decision to treat the exemption from taxes and fees given to the Southeastern Pennsylvania Transportation Authority ("SEPTA") in 45 U.S.C. § 581(c)(5) as identical to the exemption from taxes and fees previously given by Congress to the National Railroad Passenger Corporation ("Amtrak")?

LIST OF PARTIES

The parties to all of the proceedings below were the petitioner, Pennsylvania Public Utility Commission, and the respondent, SEPTA. The Township of Upper Gwynedd was a defendant in one of the consolidated cases. The Township of Lower Merion was a defendant in another. Upper Gwynedd was an appellant in the Court of Appeals. Lower Merion was not.

TABLE OF CONTENTS

Page

Restatement of the Question Presented i

List of Parties ii

Table of Citations iv

Opinions Below, Jurisdiction, and Statutes Involved ... 1

Statement of the Case 2

Reasons for Denying the Writ 6

I. 45 U.S.C. § 581(c)(5) Is Not In Conflict With the Tenth Amendment 7

II. The Statutory Scheme of 45 U.S.C. §§ 546b and 581(c)(5) Is Such That Congress' Intention Is Clear and Federal Relief Is Not Barred By the Tax Injunction Act, 28 U.S.C. § 1341 or the Eleventh Amendment 8

III. The Supposed "Conflict" Between Pennsylvania's Commonwealth Court and the Court of Appeals is Not a Reason For Granting the Writ 14

Conclusion 19

TABLE OF CITATIONS

Page

CASES

Atascadero State Hospital v. Scanlon, 473 U.S. 234 (1985) 14

National Railroad Passenger Corp. v. Pennsylvania P.U.C., 665 F. Supp. 402 (E.D. Pa. 1987), *aff'd*, 848 F.2d 436 (3d Cir.), *cert. denied*, 488 U.S. 893 (1988) ("Amtrak I") 3, 5, 6, 9, 17, 18

National Railroad Passenger Corporation v. Commonwealth of Pennsylvania, No. Civ. A. 86-8357, 1991 WL 998 (E.D. Pa. Jan. 2, 1991) ("Amtrak II") 5, 15, 17, 18

New York v. United States, 112 S. Ct. 2408 (1992) 8

SEPTA v. Pa. P.U.C., 802 F. Supp. 1273 (E.D. Pa. 1992) ("Pollak I") 1, 2, 10, 11, 14

SEPTA v. Pa. P.U.C., 826 F. Supp. 1506 (E.D. Pa. 1993) ("Pollak II") ..... *passim*

SEPTA v. Pennsylvania P.U.C., 140 Pa. Comm. Ct. 270, 592 A.2d 797 (Pa. Cmwlth. 1991), *appeal denied*, 611 A.2d 714 (1992) 13

STATUTES

28 U.S.C. § 1341 ..... 9, 10, 13, 14

45 U.S.C. § 546b ..... *passim*

45 U.S.C. § 581(c)(5) ..... *passim*

No. 94-223

In The

Supreme Court of the United States

October Term, 1994

PENNSYLVANIA PUBLIC UTILITY COMMISSION,

Petitioner,

vs.

SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF IN OPPOSITION

OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED

Respondent agrees that petitioners' recitation of the text of 45 U.S.C. § 581(c)(5) is accurate and that the jurisdiction of this Court is correctly stated. The opinions attached to the petition are also correct. The opinion of the Court of Appeals has not been published and has been marked as "Not For Publication." The two opinions of the District Court (Pollak, J.) have been published at 802 F. Supp. 1273 and 826 F. Supp. 1506. These opinions are referred to herein as "Pollak I" and "Pollak II," respectively, with citation made to the applicable pages as printed in the Petition.

STATEMENT OF THE CASE

The District Court's opinions include an accurate (and, for the most part, undisputed) recitation of the facts germane to the issues presented in these cases. *See* Pollak I, 11a-13a; Pollak II, 33a-37a. Rather than repeating what has already been said, SEPTA will summarize the factual background only briefly, concentrating on the political and legal context from which this dispute has arisen.

Public highways and railroad tracks cross each other in hundreds of places throughout Pennsylvania. Often these crossings are handled by means of a bridge: either a railroad bridge (which carries the track over the road) or a highway bridge (which carries the road over the track). Years ago, when a few great private railroads dominated much of Pennsylvania's commerce, the railroads not only maintained all the railroad bridges (as they had to if the trains were to make any use of them), they sometimes contributed to the maintenance of highway bridges. Other contributors, of course, were the highway authorities charged with making sure that automobiles could make use of those bridges.[1]

Unfortunately, the great railroads of the last century have now gone bankrupt. Moreover, the public authorities responsible for maintaining the highways are themselves short of funds. Given this shortage of money – and the high cost of maintaining an aging transportation

---

[1] Depending on the classification of a given road, the highway authority charged with its maintenance and repair could be a Commonwealth agency (*e.g.*, the Pennsylvania Department of Transportation) or a local government unit (*e.g.*, a city or township).

infrastructure – the various public entities responsible for bridges have naturally focused on means of avoiding or transferring expense. Possible targets for bearing at least some of the costs associated with highway bridges were the successors of the railroads. One such successor is the National Railroad Passenger Corporation ("Amtrak"). Another is the Southeastern Pennsylvania Transportation Authority ("SEPTA").

In 1982, the Pennsylvania Public Utility Commission ("PUC") began a series of investigations to assign maintenance and repair responsibilities for all of the bridges in Pennsylvania carrying highways over railroad tracks. Thereafter, the PUC tried, in several cases, to assign a portion of this responsibility to Amtrak and/or to SEPTA. In 1987, Amtrak responded to one such PUC directive by filing a complaint in the federal court invoking 45 U.S.C. § 546b, which exempts Amtrak "from any taxes or other fees imposed by any State, political subdivision of a State or local taxing authority." Amtrak's lawyers argued that the PUC's imposition on Amtrak of new maintenance and repair obligations with respect to highway bridges was, in effect, the imposition of a "tax or other fee" – the very thing that Congress had prohibited when it passed § 546b in 1981.

Amtrak's argument proved persuasive, first to the United States District Court for the Eastern District of Pennsylvania and then to the Court of Appeals for the Third Circuit. *See National Railroad Passenger Corp. v. Pennsylvania P.U.C.*, 665 F. Supp. 402 (E.D. Pa. 1987), *aff'd*, 848 F.2d 436 (3d Cir.), *cert. denied*, 488 U.S. 893 (1988) (*Amtrak I*). As a result, the PUC was permanently

enjoined from attempting to impose maintenance and repair costs for these highway bridges on Amtrak.

Amtrak's success, of course, originally meant little to SEPTA because the statutory exemption from "taxes and other fees" had been granted only to Amtrak. In 1988, however, Congress extended an identical exemption from "taxes or other fees" to seven different rail commuter authorities. 45 U.S.C. § 581(c)(5). SEPTA was one of those seven transit authorities. As one might expect, SEPTA promptly argued in the various ongoing PUC hearings relating to the costs associated with highway bridges that the PUC could no more impose maintenance and repair responsibilities on SEPTA than it could impose such responsibilities on Amtrak. Inasmuch as Amtrak had been held to be exempt from the imposition of such costs, so too, SEPTA reasoned, was SEPTA.

Unfortunately, neither the PUC, nor Pennsylvania's Commonwealth Court, agreed with SEPTA.[2] Unexpectedly, they took the view that the Court of Appeals' construction of Amtrak's exemption under § 546b was neither binding upon them nor, indeed, persuasive. In the PUC's view, maintenance and repair obligations were *not* "taxes or other fees" and the Court of Appeals had simply got it wrong when it held to the contrary. Although the PUC was obviously unprepared to defy the existing

---

[2] The Commonwealth Court is an intermediate appellate court of defined jurisdiction. It hears all appeals from Commonwealth agency determinations. The PUC, of course, is such an agency. The Commonwealth Court's endorsement of the PUC's position with respect to SEPTA may be found at *SEPTA v. Pennsylvania P.U.C.*, 592 A.2d 797 (Pa. Cmwlth. 1993).

injunction against imposing maintenance and repair costs on Amtrak,[3] it was prepared to try to impose the very same kind of costs *on SEPTA*, as to which no injunction was yet in place.

Given the PUC's intransigence – and the Commonwealth Court's acquiescence in that intransigence – it came as no surprise when SEPTA did the same thing Amtrak had done five years earlier. After the very next group of highway bridge cases was decided by the PUC, SEPTA promptly asked for declaratory and injunctive relief from the United States District Court for the Eastern District of Pennsylvania.[4] Inasmuch as SEPTA's exemption is *by definition* exactly the same as Amtrak's exemption,[5] SEPTA relied upon the decision in *Amtrak I* and argued that that holding should be deemed dispositive of the legal questions presented. That this was so, of course, was less a matter of legal reasoning than it was simple arithmetic: SEPTA knew that if A = zero and S = A then S = zero.[6]

---

[3] The PUC had originally attempted to take such a course with Amtrak. Its conduct met with a firm rebuff, however, in *National Railroad Passenger Corporation v. Commonwealth of Pennsylvania*, No. Civ. A. 86-8357, 1991 WL 998 (E.D. Pa. Jan. 2, 1991) (*Amtrak II*).

[4] SEPTA also filed protective appeals in the Commonwealth Court, which, when advised that SEPTA had sought relief in the federal court, stayed all further state court proceedings. Pollak II, 40a-41a.

[5] 45 U.S.C. § 581(c)(5) unambiguously exempts commuter authorities from taxes and other fees "to the same extent" as Amtrak is exempted.

[6] For purposes of the arithmetical proof, A is Amtrak, S is SEPTA, and zero is the amount each must pay on the maintenance and repair of highway bridges. A = zero because of the

Given this arithmetical proof, the principal arguments made below had less to do with SEPTA's legal right to the exemption than with the proposition that even if Congress had exempted SEPTA from paying the repair and maintenance costs associated with highway bridges, the federal courts were nevertheless powerless to protect SEPTA. This was said to be so for several reasons – the Tax Injunction Act, the Eleventh Amendment, abstention, etc. Although the legal doctrines invoked are several, the argument remains the same: even if Congress gave SEPTA a federally protected right, it gave it no federal remedy. Judge Pollak rejected this argument. So did the Court of Appeals.

REASONS FOR DENYING THE WRIT

The Petition advances three reasons for granting the writ: (1) a supposed "conflict" between the Court of Appeals and Pennsylvania's Commonwealth Court; (2) the purported unconstitutionality of 45 U.S.C. § 581(c)(5) on account of the Tenth Amendment and (3) an alleged "inconsistency" between certain opinions of this Court and the lower courts' resolution of the Tax Injunction Act/Eleventh Amendment Issue.[7] In SEPTA's view the

---

Court of Appeal's holding in *Amtrak I*; S = A because S is defined as A in 45 U.S.C. § 581(c)(5); it follows that S = Zero. Q.E.D.

[7] Given the rationale given by the lower court – to wit, a clear and manifest intention on the part of Congress – the resolution of the Tax Injunction Act and Eleventh Amendment issues is essentially the same. Related abstention arguments that

order in which these issues have been presented is confusing. The third issue received all the attention below; the second received very little; and the first is, at least in some respects, a misnomer. Accordingly, SEPTA respectfully suggests that the reasons for denying the writ are really two: (1) 45 U.S.C. § 581(c)(5) is a plainly constitutional exercise of Congress' power under the Commerce Clause and (2) the lower courts' resolution of the Tax Injunction Act/Eleventh Amendment Issue is not only consistent with the previous opinions of this Court, it is correct. On these two issues, as it happens, there is no conflict between the Court of Appeals and any other court, state or federal. The third reason for denying the petition, which is discussed last, is that the supposed "conflict" that the PUC raises in its petition, whatever it may be, does not constitute a persuasive reason for granting the writ.

I. 45 U.S.C. § 581(c)(5) Is Not In Conflict With the Tenth Amendment

The constitutional argument now advanced by the PUC was *not* the principal argument it pressed below. Still, the issue was raised and was addressed by Judge Pollak. *See* Pollak II at 47a-55a. The Court of Appeals merely endorsed Judge Pollak's opinion on this point, confining its own opinion to what it considered to be the "most difficult issue", the applicability of the Tax Injunction Act. *See* 5a.

---

were pressed below do not appear to have been included in the Petition.

While the "difficulty" of any given question will always depend, one way or the other, on the person who must answer it, the PUC's constitutional challenge to § 581(c)(5) can be easily answered. At issue in this case is the maintenance and repair responsibility for highway bridges that run over railroad tracks. SEPTA's alleged obligation to pay such fees arises out of its operation of a railroad. The railroad that SEPTA operates – although fairly described as a commuter rail network – is plainly in interstate commerce; indeed SEPTA itself operates trains in New Jersey and Delaware. SEPTA is operating such trains because the private railroads that once operated them went bankrupt and thereafter became subject to a comprehensive rail reorganization by Congress. As part of an inducement to SEPTA and other local transit authorities to operate commuter rail service directly – as opposed to contracting with Amtrak Commuter to provide the service – Congress decided to exempt the authorities from taxes and other fees to the same extent as it had previously exempted Amtrak. Congress' power to do this under the Commerce Clause cannot seriously be questioned.

How or why any of this would violate the Tenth Amendment is a bit of mystery. This is not a case in which the federal government has sought "to commandeer" a state's regulatory authorities in order to administer a federal statute, nor is it a case in which Congress has otherwise tried to force a state to govern according to its instructions. *See New York v. United States*, ___ U.S. ___, 112 S. Ct. 2408 (1992). On the contrary, it is a case in which Congress has prohibited a state from doing something inconsistent with Congress' own regulatory

scheme. As Judge Pollak noted, where Congress is acting pursuant to its power to regulate interstate commerce, it has the power to displace the states entirely if it chooses to do so. *See* Pollak II at 51a-53a. While it is true that the Tenth Amendment has had its zigs and zags in recent years, holding that it prevents Congress from regulating railroads would be a u-turn of startling proportions.

II. The Statutory Scheme of 45 U.S.C. §§ 546b and 581(c)(5) Is Such That Congress' Intention Is Clear and Federal Relief Is Not Barred By the Tax Injunction Act, 28 U.S.C. § 1341 or the Eleventh Amendment

There being no doubt that SEPTA has the same exemption as Amtrak, and the scope of that exemption having already been established in *Amtrak I*, the "difficult" question presented below was: if SEPTA is exempted from paying these costs, and if the PUC chooses to impose them anyway, is there anything that a federal court can do about it? While the arguments on this issue are quite interesting as a jurisprudential exercise, it is more than clear that the only practical answer – as well as the legally sounder answer – is yes.

The argument that the PUC pressed most strongly below was that SEPTA's case was barred by the Tax Injunction Act, 28 U.S.C. § 1341. This argument (in contrast to some others) was not foreclosed by the Court of Appeals' opinion in *Amtrak I* because the language of 45 U.S.C. § 546b differs from that used in 45 U.S.C. § 581(c)(5). Whereas § 546b specifically defines the tax exemption and the right to vindicate that exemption by

resorting to the federal courts, § 581(c)(5) says only that commuter authorities are to have whatever exemption Amtrak has. It was thus possible to argue from the statutory language that while Congress may have given SEPTA the same *substantive* rights as it gave Amtrak, it gave only Amtrak, and not SEPTA, the remedy needed to enforce that right.

The District Court rejected this narrow reading of 45 U.S.C. § 581(c)(5) when it denied the PUC's motion to dismiss. Pollak I, 21a-27a. While the Court recognized that any congressional authorization to abrogate § 1341 in a given case (or class of cases) must be "clear," it also recognized that Congress is not required to write out any "magic words" in order to manifest its intent. Pollak I, 22a & n.15. On the contrary, where it makes sense in the context of a broad statutory scheme, courts can find – and have found – clear and unambiguous congressional intent to override § 1341, even in cases where that statute is not even mentioned.[8]

In this case, of course § 1341 is plainly abrogated in one part of the statute (45 U.S.C. § 546b) and the question is whether Congress, when it extended the substantive rights granted in that statute to certain commuter authorities, meant to extend the remedy as well. Judge Pollak concluded that no other construction was defensible:

> It makes no sense to conclude that Congress designed § 581(c)(5) to be enforced exclusively in the state courts. That provision does not merely confer federal Tax immunity upon commuter authorities: it confers upon any commuter

---

[8] Pollak I, 23a (citing cases).

> authority that could have contracted with Amtrak for local rail service the same favored tax position as Amtrak so that such an entity is not penalized by its decision to operate commuter rail service directly. It would be manifestly inconsistent with that design to limit SEPTA's legal remedies to state courts, which might, as has proven true here, more narrowly construe the federal tax immunity.
>
> Moreover, reading § 581(c)(5) as an exception to the Tax Injunction Act does not frustrate the underlying purposes of the Act. § 1341 is designed to preserve from judicial interference "the imperative need of a State to administer its own fiscal affairs," *Tully v. Griffin*, 429 U.S. 68, 73 (1976), but here *Congress itself* has denied fiscal autonomy insofar as the state seeks to impose certain taxes on commuter authorities. The existence of a federally-created tax immunity distinguishes the taxes at bar from situations where the courts have refused to imply exceptions to § 1341 based on the mere existence of a general federal right of action or a general jurisdictional statute that does not specifically pertain to state taxation. . . . Where congressional interference with state fiscal autonomy is so clear and unequivocal, particular concern about federal *judicial* interference with state revenue collection is less justified.

Pollak I, 25a-27a (emphasis in original) (citations omitted).

The District Court, in other words, found the requisite congressional intent simply by analyzing what it is that Congress was doing. It is true that § 581(c)(5) does not repeat that statute word for word, but chooses

instead to exempt SEPTA "to the same extent" as Amtrak is exempt. To understand the scope of Amtrak's exemption, however, the reader must, by definition, resort to 45 U.S.C. § 546b. The right to protect the exemption by resorting to federal court is expressly granted in § 546b and is an integral part of the protection given to Amtrak in 1982. Congress' shorthand incorporation of this protection in § 581(c)(5) neither specifically includes nor specifically excludes the last sentence of § 546(b); but the only way the statutory scheme makes any sense is to read the incorporation as inclusive of *all* of Amtrak's exemption, including the right to enforce it. Otherwise, the equalization envisioned by Congress is lost, and SEPTA will be left bearing costs arising out of the commuter rail service that it took over in the 1980s, which costs would *not* have been borne by Amtrak Commuter had that entity operated the same commuter rail service. That, of course, is exactly what § 581(c)(5) was designed to avoid.[9]

It might be argued, of course, that Congress left the task of enforcing the tax exemption to others and that SEPTA can always look to the state courts for appropriate protection of its federally created rights. Whatever the merit of this idea in terms of post-Federalist political or jurisprudential theory, it is (or at least was) factually false. If there was one certainty in this case – at least prior

---

[9] It should be added that this point is in no sense rhetorical. The PUC has taken the position in at least two other bridge cases that because Amtrak has been held to be exempt, SEPTA must pay more than it (SEPTA) would otherwise pay in order to help absorb Amtrak's share.

to the District Court's hearing it[10] – it was that SEPTA could *not* look to the state courts for any remedy at all. The PUC and the Commonwealth Court made it clear that the courts of Pennsylvania, at least, did *not* intend to respect the right and would not afford SEPTA any remedy. *See SEPTA v. Pennsylvania P.U.C.*, 140 Pa. Comm. Ct. 270, 282, 592 A.2d 797, 803 (Pa. Cmwlth. 1991), *appeal denied*, 611 A.2d 714 (1992) (announcing "fundamental differences" with the Third Circuit's analysis of the scope of § 546b).[11] It follows that if the District Court had adopted the PUC's narrow construction of § 581(c)(5), thereby severing the remedy given in § 546b from the right given in the same paragraph, the right itself would have been lost along with the remedy.

In contrast, if this Court leaves undisturbed the more inclusive construction adopted below, thereby treating § 581(c)(5) as putting SEPTA in Amtrak's shoes as those shoes are cobbled in § 546b, then SEPTA's commuter rail activities will be exempt from taxes and fees to the same extent as Amtrak is (or would have been had it been

---

[10] Interestingly enough, once SEPTA took its case to federal court, the Commonwealth Court stayed the state court proceedings pending resolution of SEPTA's federal case. Pollak II, 40a-41a. Thus, although the futility of any effort to seek to vindicate SEPTA's right in state court was evident before the District Court ruled, the Commonwealth Court has done nothing yet to suggest that it would not defy the federal court's ruling on this subject once it was made.

[11] Ironically, the Pennsylvania court's refusal to recognize SEPTA's federally created right rests on the ground that the charges of which SEPTA complains do *not* constitute taxes or fees. Pollak II, 43a-44a n.8. If that were so, of course, 28 U.S.C. § 1341 would not apply.

operating the same commuter rail services). It is only this latter construction that is in accord with the intent of Congress when it passed § 581(c)(5). The construction urged by the PUC, in contrast, would have the practical consequence of repealing the statute, at least insofar as it covers highway bridges that cross railroads in Pennsylvania. What Congress clearly intended to treat the *same* would, in fact, be treated differently. The preferable construction, given the manifest purpose of the statute, is clear.

The PUC also raised the Eleventh Amendment as a bar to SEPTA's suit against it. The PUC's right to invoke Eleventh Amendment protection is itself questionable, *see* Pollak I, 28a-29a n.21, but even assuming that the PUC *could* invoke the Amendment in an appropriate case, it obviously has no such defense in a case where Congress has abrogated the immunity. *See Atascadero State Hospital v. Scanlon*, 473 U.S. 234 (1985). It follows that the PUC's Eleventh Amendment argument is no stronger (indeed perhaps a bit weaker) than its argument under 28 U.S.C. § 1341. In each case, the supposed bar may be overcome by the clearly expressed intention of Congress and, as the District Court rightly found, that clearly expressed intention is present here. *See* Pollak I, 27a-29a; Pollak II, 36a n.4.

III. The Supposed "Conflict" Between Pennsylvania's Commonwealth Court and the Court of Appeals is Not a Reason For Granting the Writ.

Given the constitutionality of the statute and the manifest need for federal court relief to vindicate the

congressional purpose in passing it, it is clear that the courts below were right in their resolution of the issues raised by the PUC in these cases. Nevertheless, the PUC suggests that it is now caught in some kind of "conflict" as a result of the Court of Appeals' decision. The supposed "conflict," however, is more accurately described as a disagreement about the previous decision of the Court of Appeals in the *Amtrak* case. It is not a "conflict" over any of the issues discussed above and, more to the point, it creates no uncertainty or confusion with respect to what these parties – or anyone else – can or must do under the law.

That the PUC is obliged to respect a federal injunction is not particularly surprising, and certainly is a proposition that will not surprise the PUC. It has some experience in this regard. Six years ago, this Court denied the PUC's petition for a writ of certiorari to the Court of Appeals for the Third Circuit after that court had affirmed the decision reached by the District Court in *Amtrak I*. Thereafter, the PUC took the position that that case applied only to its own precise facts and continued in its efforts to impose some other maintenance and repair expenses on Amtrak. Amtrak was obliged to go back to court – in *Amtrak II* – to make it clear that the federal statute would be applied consistently, and in every case. *See National Railroad Passenger Corporation v. Commonwealth of Pennsylvania*, No. Civ. A. 86-8357, 1991 WL 998 (E.D. Pa. Jan. 2, 1991) (*Amtrak II*). The District Court's decision in that case was unambiguous:

> It is well accepted that person bound by an injunctive order of a court must obey the order's command. [citation omitted] Moreover, state

> and local officials, commissions, departments, agencies and the like may be compelled to abide by injunctive orders issued by a court. [citation omitted] Federal courts "are not reduced to issuing injunctions against state officers and hoping for compliance. Once issued, an injunction may be enforced." *Hutto v. Finney*, 437 U.S. 678, 690, 98 S.Ct. 2565, 2573 (1978).

Id. at *3. The PUC, in other words, was bound by the District Court's previous order.[12]

It is certainly fair to say that the PUC – and, indeed Pennsylvania's Commonwealth Court – think that the *Amtrak* cases were wrongly decided. That is a good faith disagreement on the law. But it is not a "conflict" in the sense that there is any uncertainty or confusion about what the law is or how the PUC must act in light of that law. Amtrak is exempt from paying the expenses that the PUC sought to impose upon it. A federal court has enjoined the PUC from trying to do what federal law forbids. The PUC is a disappointed litigant, to be sure, but its disappointment does not create a "conflict" of the type normally brought to this Court.

When – in 1988 – Congress afforded SEPTA (and certain other commuter authorities) an exemption from taxes and fees that was by its terms *identical* to Amtrak's exemption, it was inevitable that SEPTA would ask to be treated the same way Amtrak is treated. The PUC's refusal to do so reflects, at least in part, its continuing

---

[12] That the court did not consider this question to be a close one is also clear from its order, which required the PUC to pay the attorneys' fees Amtrak incurred in contesting the PUC's post injunction efforts to impose costs on Amtrak.

disagreement with the substance of the *Amtrak* decisions. When the matter was taken to the Commonwealth Court, it is entirely true that that court cited "fundamental differences" it had with the Third Circuit, and noted that it would have decided the Amtrak cases differently:

> We disagree with the Third Circuit that a special assessment is a tax. Under Pennsylvania law, special assessments for linear improvements are made on the basis of who receives the benefits. An assessment cannot be imposed on property not in fact receiving a benefit. It is a burden or benefit one bears or receives incidental to one's ownership of land, not a tax or fee to support the public welfare. [citation omitted]

See PUC v. SEPTA, 592 A.2d at 803 n.12. The Commonwealth Court did not say, however, that it, or the PUC, would defy a federal court injunction vindicating the exemption. And, when SEPTA went to federal court to obtain such relief, the Commonwealth Court promptly stayed the state proceedings on the topic, pending resolution of SEPTA's federal claim.

Insofar as a conflict does exist, then, what is it about? There is certainly no "conflict" between the Court of Appeals and the Commonwealth Court over whether the Tax Injunction Act applies. Both agree that it does not: the Court of Appeals because of a Congressional decision to override the Act; the Commonwealth Court because it does not consider the maintenance and repair obligations to be "taxes" sufficient to trigger the Act. Nor is there any "conflict" about the applicability of the Tenth or Eleventh amendments. In fact, the only real "conflict" is about the merits not of this case but of *Amtrak I*. But if the PUC is

free, as it surely is, to believe *that* case was wrongly decided, it is not free – as *Amtrak II* makes abundantly clear – to behave as if it didn't exist. So here, as in *Amtrak*, if the PUC defied the injunction by confirming to issue orders imposing maintenance and repair costs on SEPTA, SEPTA would be obliged to seek a further order from the Court below. That is not a "conflict"; it is the rule of law.

Finally, it bears mention that if matters had been left in the state they were in *before* Judge Pollak issued his injunction, a real "conflict" would have come into play. Notwithstanding the clear language of 45 U.S.C. § 581(c)(5), SEPTA's exemption from "taxes and other fees" would have been very different in its scope than the exemption afforded to Amtrak. Moreover, the difference would have arisen solely out of a refusal by the Pennsylvania Courts to follow the construction of a federal statute previously advanced by the Court of Appeals. All that has happened as a result of Judge Pollak's decision, however, is that SEPTA has been afforded the same exemption from taxes and fees as Amtrak. That this is what Congress intended is obvious from the clear language of § 581(c)(5).

The only real disagreement is, and always has been, whether the kind of maintenance and repair expenses at issue in these bridge cases should be deemed "taxes and other fees" within the meaning of the original exemption given Amtrak in 1982. This question was the subject of the *Amtrak* cases and was decided in 1988. There continues to be a difference of opinion about the merit of that decision but there is no "conflict" or confusion about it. It is true, of course, that this Court can choose to hear this case if it wishes to examine the meaning of the words

"taxes and other fees" as those terms are argued in 45 U.S.C. § 546b. It is not true, however, that there is genuine "conflict" that this Court now needs to "resolve" with respect to either § 546b or § 581(c)(5).

CONCLUSION

The PUC's zeal in finding alternative sources of funds for the maintenance and repair of Pennsylvania highway bridges is admirable. Certainly SEPTA would be grateful for any alternative sources of funds for the maintenance and repair of the many railroad bridges that it needs to maintain if it is going to operate the rail service it agreed to take over, at Congress' invitation, several years ago. In the present case, however, the PUC is overreaching and the lower courts' resolution of its dispute with SEPTA about assessments for highway bridges need not, and should not, be disturbed.

Respectfully submitted,

DAVID P. BRUTON
ALFRED W. PUTNAM, JR.
DRINKER BIDDLE & REATH
Philadelphia National Bank Building
1345 Chestnut Street
Philadelphia, PA 19107-3496
(215) 988-2711

Attorneys for Respondent